

1
2
3
4
5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 JOSIE J BELL, No C 07-3171 VRW
10 Plaintiff, ORDER
11 v
12 MICHAEL J ASTRUE,
13 Commissioner of Social Security,
14 Defendant.

16 Plaintiff Josie J Bell appeals from the decision of the
17 Social Security Administration (SSA) denying plaintiff supplemental
18 security income (SSI) and disability insurance benefits (DIB). The
19 parties have filed cross-motions for summary judgment. The court
20 DENIES plaintiff's motion and GRANTS the cross-motion by defendant
21 Michael J Astrue.

Plaintiff was born on June 16, 1954. Administrative Record (Doc # 8) (AR) 66. Plaintiff is a high school graduate and has taken some college classes. AR 432. From 2001 until her alleged onset of disability in 2003, her occupation was "caregiver"

1 for In-Home Supportive Services. AR 89. One of plaintiff's jobs
2 was to take care of an autistic woman by performing household
3 duties, pushing her in a wheelchair and dressing her. AR 433. Her
4 other work experience includes clerical and data entry jobs. AR
5 84. The Administrative Law Judge (ALJ) described plaintiff's work
6 history as reflecting "very low and sporadic earnings," which he
7 attributed to her history of substance abuse. AR 25.

8 Plaintiff alleges that she became disabled on August 31,
9 2003 after she injured her right middle finger. AR 66, 85, 433-34.
10 In her application for benefits, plaintiff listed "severe
11 depression-psychosis, herniated disc, thyroid disorder, [right]
12 middle finger crushed." AR 88.

13 Plaintiff developed herniated discs in the lumbar spine
14 in the 1980s while moving heavy furniture. AR 238. The herniated
15 disc condition is well-documented in the record (see, e.g., 269,
16 365, 369, 413, 416) and was credited by the ALJ as a "severe"
17 impairment. AR 23.

18 In late August 2003, plaintiff injured the middle finger
19 on her right hand by slamming it in a car door, resulting in a
20 "mallet finger" deformity after which plaintiff could not fully
21 extend that finger. AR 200-01, 433. Although plaintiff
22 characterized this event as the onset of her period of disability,
23 there is little discussion of this condition in the record and the
24 ALJ did not credit it among her "severe" impairments.

25 On August 6, 2004, plaintiff was taking the garbage downstairs
26 when she slipped and fell down "eight flights of stairs,"
27 sustaining a right rotator cuff tear in her shoulder. AR 438-40.
28 The limitations attributable to this injury form the crux of

1 plaintiff's appeal. Plaintiff received treatment for the shoulder
2 injury that included several medical examinations, a magnetic
3 resonance imaging (MRI) scan and physical therapy. A September 10,
4 2004 physical therapy orthopedic evaluation indicates that
5 plaintiff had pain in reaching, lifting or using her right
6 extremity. AR 297. She had tingling in her fingers and had
7 difficulty "gripping." Id. Plaintiff, however, only went to two
8 physical therapy sessions, both in September 2004. Although the
9 treatment plan called for therapy sessions once or twice a week for
10 several months, plaintiff cancelled one or two subsequent
11 appointments and failed to show up for the others. AR 298-300. On
12 December 1, 2004, plaintiff underwent a MRI scan which revealed a
13 "[f]ull-thickness tear with atrophy and retraction of the
14 supraspinatus tendon." Thereafter, plaintiff's medical chart notes
15 periodically mention shoulder pain. AR 366, 369, 413, 416. For
16 example, a progress note dated May 19, 2006 includes "Has some
17 chronic R shoulder pain. Needs refill of meds." AR 413. The ALJ
18 credited the rotator cuff injury as a "severe impairment." AR 23.

19 The record contains three reports evaluating plaintiff's
20 physical residual functional capacity (RFC). The first two were
21 completed before plaintiff incurred her rotator cuff injury.

22 On January 29, 2004, Dr Burton Brody, a consultative
23 internist, examined plaintiff and prepared a consultative physical
24 evaluation at the request of the SSA. AR 238-40. Dr Brody noted
25 plaintiff's herniated discs, depression, hypothyroidism with goiter
26 and tendinitis and opined that she had no sitting limitations and
27 could walk and stand up to a total of four hours per day. AR 238,
28 240. Dr Brody found plaintiff able to lift and carry up to ten

1 pounds with moderate limitations on motions such as bending,
2 stooping, kneeling, crawling, and squatting. AR 240.

3 On February 19, 2004, Dr Joseph W Clift, a non-examining
4 agency physician, prepared a physical RFC evaluation based on
5 evidence in the file, including clinical and laboratory findings,
6 symptoms and observations. AR 287-94. Unlike Dr Brody, Dr Clift
7 found that plaintiff could sit no more than six hours in an eight-
8 hour workday, but could stand and/or walk for a total of about six
9 hours. AR 288. He found that she could occasionally lift and/or
10 carry up to twenty pounds and frequently lift and/or carry ten
11 pounds and could climb, balance, stoop, kneel, crouch and crawl
12 only occasionally. AR 289.

13 On December 22, 2005, two months after plaintiff's
14 October 2005 hearing before the ALJ (discussed below), treating
15 physician Farrell C Barnett of the Alameda County Medical Center
16 filled out a "multiple impairments questionnaire" prepared by
17 plaintiff's attorney regarding plaintiff's physical conditions. AR
18 357-64. The ALJ had held the record open in order to be able to
19 consider a report from a treating physician addressing the rotator
20 cuff injury and plaintiff's drug use status. AR 450-56. Beginning
21 in December 2003, Dr Barnett had seen plaintiff once every three to
22 six months. AR 357. Dr Barnett only recorded diagnoses of
23 hypothyroidism and right shoulder tendinitis; he did not mention
24 lumbar difficulties. *Id.* According to Dr Barnett's rather sparing
25 and cryptic markings on the questionnaire, plaintiff could sit,
26 stand or walk for only four hours in an eight-hour day but, while
27 it was not medically necessary for her "not to sit continuously in
28 a work setting," she required freedom to get up and move around as

1 needed. AR 359-60. Dr Barnett opined that plaintiff could
2 occasionally lift and/or carry no more than ten pounds. AR 360.

3 In response to the question "Does your patient have
4 significant limitations in doing repetitive reaching, handling,
5 fingering or lifting?," Dr Barnett wrote: "Yes. [Illegible] R upper
6 extremity." Id. Dr Barnett left blank a half-page of questions
7 designed to refine or seek more detail about upper extremity
8 limitations. AR 301. To the question "Would your patient's
9 symptoms likely increase if he/she were placed in a competitive
10 work environment?," Dr Barnett first checked "no," then crossed it
11 out and checked "yes" and inserted the handwritten note: "if she
12 used her R arm a lot." AR 361-62. In the section on pain, Dr
13 Barnett noted only "pain in R shoulder," which he indicated
14 occurred "daily—often during day," rated seven on a ten-point
15 scale and was "periodically" severe enough to interfere with
16 attention and concentration. AR 358-59, 362. Dr Barnett checked
17 blanks indicating plaintiff was not in his opinion a malingerer and
18 was capable of low-stress jobs. AR 362-63.

19 Plaintiff's long history of depression and substance
20 abuse takes up much of the administrative record but is not at
21 issue on this appeal. To summarize it briefly, plaintiff received
22 treatment in her former community in Arkansas for depression in
23 1998-99 and was prescribed antidepressant and antipsychotic
24 medications. AR 167, 170. In September 2003, plaintiff
25 voluntarily entered the Orchid Women's Recovery Center in Oakland.
AR 84, 121. In November 2003, plaintiff visited Sausal Creek
27 Outpatient Stabilization Clinic in Oakland, California for mental
28 health outpatient care. AR 208. Plaintiff reported to the clinic

1 that she last used crack and alcohol just before entering the
2 recovery program. Id. Plaintiff was given Wellbutrin, an anti-
3 depressant medication to treat major depressive disorder. AR 215.

4 On January 23, 2005, plaintiff was brought to Eden
5 Medical Center after a referral from the Sausal Creek Mental Health
6 Clinic in Oakland for suicidal ideations. AR 315. Plaintiff
7 reported that she was in a lot of pain due to her rotator cuff
8 injury, fibroids in her uterus and two herniated discs and she
9 admitted that she had been using crack cocaine daily since July
10 2004. Id. She also admitted that she had drunk alcohol that night
11 and wanted to jump from the Golden Gate Bridge. Id. The treating
12 doctors prescribed Prozac and Wellbutrin for depressive disorder,
13 Levoxyl for hypothyroidism, Seroquel for psychotic conditions and
14 Vicodin for pain. AR 302. After plaintiff was stabilized, she was
15 discharged on January 26, 2005.

16 The record contains two mental RFC assessments. Both
17 concluded that plaintiff was able to carry out simple repetitive
18 tasks but not detailed instructions. Clinical psychologist Dr
19 Vicky Campagna's January 27, 2004 evaluation included the Bender
20 Visual Motor Gestalt test, the Wechsler Adult Intelligence Scale
21 III test and the Wechsler Memory Scale III test. AR 231. Dr
22 Campagna opined that plaintiff's "ability to function in a work-
23 related setting was not impaired" and she was able to learn simple
24 repetitive tasks, follow simple two- and three-part instructions
25 and sustain independent activities. AR 234. Dr Campagna diagnosed
26 plaintiff with major depression and "polysubstance dependence in
27 short-term remission" with a Global Assessment of Functioning (GAF)
28 score of 60. AR 234-35.

1 On February 18, 2004, Dr George Norbeck, a non-examining
2 DDS physician, prepared a psychiatric review technique form, AR
3 242-55. Dr Norbeck checked boxes for the affective disorder
4 "depressive syndrome" with anhedonia, appetite disturbance, sleep
5 disturbance, decreased energy, feelings of guilt and difficulty
6 concentrating or thinking. AR 245. He also found a substance
7 addiction disorder to be present indicating that he had evaluated
8 it under affective disorders. AR 250. In the section of the form
9 dealing with rating functional limitations, Dr Norbeck indicated no
10 restriction of activities of daily living, mild limitation in
11 maintaining social functioning and mild to moderate limitation in
12 maintaining concentration, persistence or pace. AR 252. On the
13 same date, Dr Norbeck completed a mental RFC assessment in which he
14 found no significant limitations in any of twenty areas of
15 functioning except the ability to understand and remember detailed
16 instructions and to carry out such instructions, which he noted to
17 be "markedly limited." AR 283. He also marked both "not" and
18 "moderately limited" for the ability to maintain attention and
19 concentration for extended periods. *Id.*

20

21 B

22 On October 23, 2003, plaintiff applied for SSI and DIB
23 under Title II and Title XVI of the Social Security Act
24 respectively. AR 66-68, 405-06. The SSA denied plaintiff's
25 initial application on April 2, 2004, AR 37-41, and her
26 reconsideration request on November 29, 2004. AR 46-51. Plaintiff
27 then requested a hearing before an ALJ, which was held on October
28 24, 2005. AR 428-58.

1 Plaintiff appeared at the hearing with her lawyer and
2 testified about her physical limitations, depression and substance
3 abuse. AR 428-58. No expert witnesses testified at the hearing.
4 AR 430. Compared to the three reports evaluating plaintiff's
5 physical limitations, plaintiff assessed her own RFC as more
6 limited. Plaintiff stated that: her herniated discs caused her
7 left leg to tremble and shake after standing for more than ten
8 minutes or walking for more than five minutes (AR 443, 445-46); she
9 could sit for only fifteen minutes before needing to get up and
10 move around (AR 446); her left hand could not lift more than five
11 to six pounds, due to limited strength on the left side of her body
12 (AR 446-47) and the right rotator cuff tear rendered her unable to
13 raise her right arm above her shoulder, lift anything, make a bed,
14 curl her hair or even hold a pencil. AR 436-37. When asked what
15 medical problems prevented her from returning to work, plaintiff
16 testified that in 1996, she went through a divorce, her mother died
17 and her adult son was shot. When pressed for current information,
18 she testified that she still suffered from depression and anxiety
19 and "a general sense of sadness all the time." AR 440-41.
20 Plaintiff also testified that she had a history of substance abuse,
21 including pain pills, methamphetamine and cocaine (AR 441, 444) but
22 had stopped using drugs the day before her admission to Eden
23 Medical Center in January of 2005. AR 444.

24 On March 31, 2006, the ALJ issued a ten-page decision
25 denying plaintiff's applications. The ALJ found that: 1)
26 plaintiff met the insured status requirements of the Act through
27 June 2006 and had not been engaged in substantial gainful activity
28 during the relevant period; 2) of plaintiff's impairments, the

1 cocaine dependence, major depressive disorder, degenerative disease
2 of the lumbar spine and right shoulder rotator cuff tear were
3 "severe"; 3) plaintiff's impairments did not meet or equal either
4 of two listed impairments in Part 404, specifically Listing 12.04
5 together with 12.09 (affective disorder with substance addiction
6 disorder) or 1.01 (musculoskeletal impairments); 4) plaintiff
7 retained the physical RFC for sedentary work with a limitation for
8 overhead work with the right arm but, due to drug addiction and
9 depression, was precluded from sustained work activity; 6) due to
10 cocaine addiction, plaintiff could not perform her past relevant
11 work as a clerk or any other job that existed in significant
12 numbers in the national economy. AR 23-27. The ALJ concluded that
13 if plaintiff were to stop the substance use, she could perform
14 sedentary jobs without right-arm overhead work involving simple,
15 repetitive tasks that exist in significant numbers in the national
16 economy. AR 28. Finally, the ALJ determined that because the
17 substance use was a contributing factor material to the
18 determination of disability, plaintiff had not been disabled within
19 the meaning of the Social Security Act at any time through the date
20 of the decision. AR 29.

21 The ALJ discounted Dr Barnett's opinion that plaintiff
22 could sit only four hours in an eight-hour work day, a limitation
23 that would have barred plaintiff from most sedentary work under
24 Social Security Ruling 96-9p. The ALJ reasoned that no weight
25 should be assigned to Dr Barnett's sitting limitation because that
26 functional assessment was based on plaintiff's right shoulder
27 tendinitis only and contained "no mention of any ongoing low back
28 pain, or limitations from lumbar degenerative disc disease." AR

1 25-26. Instead, the ALJ relied on Dr Brody's consultative physical
2 evaluation in concluding that plaintiff was limited to sedentary
3 work as opposed to light work in accordance with non-examining
4 physician Dr Clift's opinion. The ALJ stated:

5 I credit the examination of consultative internist that
6 the claimant is limited to sedentary work. The DDS
7 assessed that the claimant could perform light exertion
work, even considering her lumbar degenerative disc
disease and moderate obesity.

8 AR 26. The ALJ credited Dr Brody's opinion over Dr Clift's because
9 the latter did not examine plaintiff and credited plaintiff's
10 complaints of lower back pain "to reduce the DDS finding of light
11 exertion work to sedentary work." AR 26, 28.

12 On May 11, 2006, plaintiff requested the SSA's Appeals
13 Council to review the ALJ decision. AR 14-16. The Appeals Council
14 denied review, and the ALJ's decision became final. AR 8-11. On
15 June 15, 2007, plaintiff commenced the instant action for judicial
16 review of the final decision. After defendant answered, both
17 parties filed cross-motions for summary judgment. Doc # 10, 11.
18

19 II

20 A district court's review of an ALJ's decision is limited
21 to determining whether it is supported by substantial evidence and
22 correct legal principles. See generally, Thomas v Barnhart, 278
23 F3d 947, 954 (9th Cir 2002). "Substantial evidence" is "more than
24 a mere scintilla but less than a preponderance; it is such relevant
25 evidence as a reasonable mind might accept as adequate to support a
26 conclusion." Id. Determinations of credibility, resolution of
27 conflicts in medical testimony and all other ambiguities are to be
28 resolved by the ALJ. Id.

1 To determine whether a claimant is disabled and entitled
2 to benefits, the SSA conducts a five-step sequential inquiry. 20
3 CFR § 404.1520. Under the first step, the ALJ considers whether
4 the claimant is currently employed in substantial gainful activity.
5 If not, in the second step the ALJ examines whether the claimant
6 has a "severe impairment" that significantly affects his or her
7 ability to conduct basic work activities. In step three, the ALJ
8 determines whether the claimant has a condition which "meets" or
9 "equals" the conditions outlined in the Listings of Impairments in
10 Appendix 1, Subpart P, Regulations No 4. 20 CFR §404.1520. If the
11 claimant does not have such a condition, in step four the ALJ
12 considers whether the claimant can perform her past relevant work.
13 If not, in step five, the ALJ considers whether the claimant has
14 the ability to perform other work which exists in substantial
15 numbers in the national economy. 20 CFR §§404.1520(b)-(f).

16 Even if a claimant is found "disabled" under the five-
17 step evaluation process in 20 CFR § 404.1520, the ALJ must find the
18 claimant "not disabled" if the medical evidence indicates that drug
19 addiction and/or alcoholism materially contributed to the finding.
20 Parra v Astrue, 481 F3d 742, 747 (9th Cir 2007). The ALJ must
21 determine which of the claimant's disabling limitations would
22 remain if claimant stopped abusing drugs and alcohol. 20 CFR §
23 404.1535(b). If the remaining limitations would not yield a
24 disability finding, then the claimant's substance abuse is material
25 and benefits must be denied. *Id.*

26 \\

27 \\

28 \\

III

Plaintiff contends that the ALJ erred in finding her not disabled. She does not challenge the ALJ's drug and alcohol analysis with regard to her mental limitations—i.e., that if she discontinued her drug use, only her physical limitations would remain. Plaintiff contends, however, that the ALJ erred in ruling that plaintiff possessed the physical RFC for sedentary work excluding overhead work with the right arm because, she contends, the right shoulder tendinitis is responsible for a more grave limitation to her RFC than the ALJ's determination acknowledges.

Specifically, plaintiff contends that the ALJ improperly ignored Dr. Barnett's opinion that plaintiff had significant limitations in performing repetitive reaching, handling, fingering or lifting with her right arm. Doc #10 at 12-13. Social Security Ruling 85-15 states that "reaching * * * and handling * * * are activities required in almost all jobs. Significant limitations of reaching or handling, therefore, may eliminate a large number of occupations [that] a person could otherwise do. Varying degrees of limitations would have different effects, and the assistance of a [vocational expert] may be needed to determine the effects of the limitations." Similarly, fingering "is needed to perform most unskilled sedentary jobs and to perform certain skilled and semiskilled jobs at all levels of exertion." Id. "The varying degrees of loss which can occur may require a decision-maker to have the assistance of a [vocational expert]." Id.

Plaintiff argues that the rules about treating source medical opinions articulated in Lester v Chater, 81 F3d 821, 830 (9th Cir 1995), govern this case. Specifically, where the treating

1 doctor's opinion is not contradicted by another doctor, it may be
2 rejected only for "clear and convincing" reasons. Id. In this
3 case, the record contains no other physician's opinion about the
4 rotator cuff because the injury occurred ten months after she had
5 applied for benefits and after the consulting physical RFC and non-
6 examining medical reviews had been completed. The ALJ had already
7 delayed rendering a decision in the case in order to allow
8 plaintiff to obtain the RFC assessment from Dr Barnett and to
9 supplement the administrative record with it. There is, therefore,
10 no medical evidence in the record contradicting Dr Barnett's
11 opinion that plaintiff had significant limitations in performing
12 repetitive reaching, handling, fingering or lifting. Plaintiff
13 argues that Dr Barnett's opinion may be rejected only for "clear
14 and convincing" reasons. She asks, moreover, that her case be
15 remanded to the SSA for an award of benefits solely on the strength
16 of Dr Barnett's scant notations on the RFC questionnaire.

17 There are several problems with plaintiff's argument.
18 First, Dr Barnett's report is patently insufficient to support a
19 disability finding. Dr Barnett left blank all the questions
20 bearing directly on specific right upper extremity limitations:
21 those evaluating the degree of limitation, if any, in "grasping,
22 turning and twisting objects," "using fingers/hands for fine
23 manipulations" and "using arms for reaching (including overhead)." AR
24 361. Also, Dr Barnett wrote that plaintiff's prognosis was
25 "good" and marked "N/A" for other treatment, such as surgery and
26 physical therapy. AR 357, 361. A reasonable reading of Dr
27 Barnett's report is that he did not regard the right rotator cuff
28 injury as disabling, either in the short or the long term.

1 Second, the ALJ did not discount or reject Dr Barnett's
2 opinion, but rather credited it and used it as the basis for his
3 step-four determination that plaintiff could not return to clerical
4 work because of the potential for overhead tasks. AR 25.
5 According to the Merck Manual, the rotator cuff's primary function
6 is to provide stability during overhead arm motions:

7 The rotator cuff, consisting of the supraspinatus,
8 infraspinatus, teres minor, and subscapularis (SITS)
9 muscles, helps stabilize the humerus in the glenoid
fossa of the scapula during many athletic overhead
arm motions (eg, pitching, swimming, weightlifting,
serving in racket sports).

10 <http://www.merck.com/mmpe/sec21/ch324/ch324e.html?qt=rotator%20cuff&alt=sh#sec21-ch324-ch324e-978> (consulted July 23, 2008). Imposing
11 a limitation on overhead work with the affected arm was therefore a
12 reasonable way for the ALJ to interpret the evidence in the record.
13

14 And finally, plaintiff failed to avail herself of
15 physical therapy that might have helped her rotator cuff condition,
16 a fact of considerable legal significance. 20 CFR § 404.1530
17 requires a claimant to follow treatment prescribed by treating
18 physicians, clearly stating that the consequence of failing to
19 follow treatment is denial or loss of benefits:
20

21 If you do not follow the prescribed treatment without
a good reason, we will not find you disabled or, if
22 you are already receiving benefits, we will stop
paying you benefits.

23 20 CFR § 404.1530(b). When plaintiff first presented with her
24 rotator cuff injury, her physician prescribed a course of physical
25 therapy. Plaintiff did not follow the course of therapy but
26 abandoned it after two sessions. AR 297-300. At the hearing, the
27 ALJ asked plaintiff whether she was receiving physical therapy. AR
28 452. Plaintiff responded misleadingly: "I don't have any medical

1 insurance" (AR 453) and did not tell the ALJ that she had already
2 had a course of physical therapy scheduled and had failed to avail
3 herself of most of it. Although the ALJ may not have been aware of
4 this and, indeed, did not mention it in his decision, the evidence
5 in the record documenting plaintiff's failure to follow through
6 with prescribed therapy further buttresses the ALJ's decision.
7 Plaintiff may not receive disability benefits without first
8 exhausting medically prescribed treatment options available to
9 address the alleged discomfort, weakness and decreased range of
10 motion in her right arm and hand.

11
12 IV

13 For the foregoing reason, the court DENIES plaintiff's
14 motion for summary judgment and GRANTS defendant's motion for
15 summary judgment. The clerk is directed to close the file and
16 terminate all pending motions.

17
18 IT IS SO ORDERED.

19
20 
21 VAUGHN R WALKER
22 United States District Chief Judge
23
24
25
26
27
28